

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1575

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

MIDWEST VIDEO CORPORATION, et al.,
Respondents.

No. 77-1648

AMERICAN CIVIL LIBERTIES UNION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
and UNITED STATES OF AMERICA,
Respondents,

AMERICAN BROADCASTING COMPANIES, INC., et al.,
Intervenors.

No. 77-1662

NATIONAL BLACK MEDIA COALITION, CITIZENS FOR
CABLE AWARENESS IN PENNSYLVANIA, and
PHILADELPHIA COMMUNITY CABLE COALITION,
Petitioners,

v.

MIDWEST VIDEO CORPORATION, et al.,
Respondents.

**MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS
CURIAE CONSUMERS UNION OF UNITED STATES, INC. IN SUP-
PORT OF PETITION FOR WRIT OF CERTIORARI**

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**MOTION OF CONSUMERS UNION OF UNITED STATES,
INC. FOR LEAVE TO FILE A BRIEF AMICUS CURIAE
IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI**

Consumers Union of United States, Inc. ("Consumers Union") hereby moves the Court, pursuant to Rule 24, for leave to file the accompanying brief *amicus curiae* in support of the Petitions for Writ of Certiorari. Although Consumers Union will not file a brief on the merits, should the petitions be granted, it urges this Court to grant the Petitions for Certiorari in order to consider the issues in this case which very significantly affect consumers.

INTEREST OF AMICUS

Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide information, education, and counsel about consumer goods and services and the management of family income. Consumers Union's income is derived solely from the sale of *Consumer Reports*, its other publications and films. Expenses of occasional public service efforts may be met, in part, by nonrestrictive, non commercial grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports*, with more than 1.8 million circulation, regularly carries articles on health, product safety, marketplace economics, and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

Consumers Union will be affected directly by the disposition of the present Petitions. Consumers Union has a significant interest in improving the quality, availability, and access to cable television systems and it represents the interests of its members in obtaining access to cable television systems.

Consumers Union, jointly with the Office of Communications of the United Church of Christ and UNDA-USA (an Association of Catholic Broadcasters) petitioned the Federal Communications Commission pursuant to Title 5 U.S.C. § 553(e) to initiate an investigation and rulemaking to amend the Commission's rules concerning the public service obligations of cable television systems. (F.C.C. Rulemaking Docket No. RM-2985.) That petition is pending. The holding of the Eighth Circuit Court of Appeals in these cases may have a direct impact on Consumers Union's petition for rulemaking and, if allowed to stand, arguably would foreclose the Commission from granting such petition for rulemaking.

The interests presented by Consumers Union in these cases are the interests of consumers in obtaining meaningful access to cable television systems in order to disseminate via cable a variety of information including consumer information. These interests also include the interests of consumers in the development of a viable alternative to the existing broadcast industry structure which would serve such public interest goals as fostering media diversity and local control of information sources. The interests of Consumers Union are not identical to the interests represented by the parties in these cases. Consequently, presentation of Consumers Union's views should assist the Court in making an informed decision with respect to the Petitions for Writ of Certiorari.

Although Consumers Union obtained the consent of Petitioner Federal Communications Commission, Petitioner American Civil Liberties Union, and Petitioners National Black Media Coalition, et al., to the filing of this brief, it was unable to obtain consent from the Respondent, Midwest Video Corporation. Consequently, Consumers Union makes the present motion for leave to file a brief

amicus curiae in support of the Petitions for Writ of Certiorari.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The interest of *amicus curiae* Consumers Union of United States, Inc. ("Consumers Union") in these cases is set forth in the accompanying motion for leave to file this brief.

ARGUMENT

In *Midwest Video Corporation v. Federal Communications Commission*, 571 F.2d 1025 (8th Cir., decided February 21, 1978), the Eighth Circuit held that the Federal Communications Commission's cable television access regulations, promulgated in *Report and Order in Docket No. 20508*, 59 F.C.C. 2d 294 (1976), exceeded the Commission's jurisdiction. For the reasons set forth below, this Court should grant the Petitions for Writ of Certiorari and accord plenary review to these cases, giving due consideration to the consumer interests involved.

I

THE JURISDICTIONAL QUESTION

The Eighth Circuit incorrectly analyzed the applicable precedents governing the exercise of Federal Communications Commission jurisdiction over cable television.

In *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968), this Court employed a two-tiered analysis in determining that the Commission properly had exercised jurisdiction over cable television, a technology for which the Communications Act of 1934, as amended, provides no specific guidance. First, the Court held that Section 2(a)

of that Act, 47 U.S.C. § 152(a), gives the Commission the power to regulate cable. 392 U.S. 157, 173. See also, *United States v. Midwest Video Corporation*, 406 U.S. 649 (1972) (hereinafter, *Midwest Video I*). The Court then proceeded to define the scope of that power. It held that the Commission has the authority to issue such cable regulations, based upon the power found in Section 2(a), as are "reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting." 392 U.S. at 178.

In *Midwest Video I, supra*, the Court construed the scope of the Commission's authority in order to determine whether it had properly issued program origination rules. The question of the Commission's power under Section 2(a) to issue the rules governing "cablecasting" was not contested by the parties. 406 U.S. 649, 662. The plurality opinion emphasized that the application of the "reasonably ancillary" test for limiting the scope of jurisdiction was not intended to confine the Commission to promulgating only cable rules and regulations which would protect the broadcast industry. 406 U.S. 694, 664. And the concurring opinion of Mr. Chief Justice Burger emphasized that "until Congress acts, the Commission should be allowed wide latitude [in regulating cable television.]" 406 U.S. 649, 676.

However, the Eighth Circuit appears to have applied rigidly a rule that the Commission's only business in regulating cable television is to ensure that cable does not compete successfully for the same markets as do local broadcasters, a rule which is contrary to the holding in *Midwest Video I, supra*, 406 U.S. at 664. It failed to give the Commission the flexibility suggested in the concurring opinion in that case. And it failed to examine Section 2(a) to find the source of power on which the Commission's actions in

this case are based, contrary to the holding of this Court in *Southwestern Cable Co.*, *supra*.

The depth of the Eighth Circuit's fundamental error is apparent in the language of its opinion:

The present rules are not designed to govern some deleterious interrelationship of cable systems to broadcasting, or to require that cable systems do what broadcasters do, but relate to cable systems alone, and are designed to force them into activities not engaged in or sought; activities having no bearing, adverse or otherwise, on the health and welfare of broadcasting. 571 F.2d 1025, 1038. (footnote omitted.)

Thus, mistaking the "reasonably ancillary" test as one for determining the source of the Commission's power, rather than as one for determining the scope of the Commission's power, the court below erroneously held that the Commission had no jurisdiction to promulgate the rules here in issue.

Because the Eighth Circuit failed to apply the Court's holding in *Southwestern Cable Co.* that Section 2(a) is the source of the Commission's jurisdiction to regulate cable television, because it applied the "ancillary jurisdiction" test to determine the source of power, rather than the scope of power as provided in *Southwestern Cable Co.*, and because it failed either to divorce the Commission's jurisdiction over cable from the mere protection of broadcasters' interests or to permit the flexibility of regulation suggested in *Midwest Video I*, the decision below is erroneous.

If the Eighth Circuit Court of Appeals decision is allowed to stand, the law governing the Commission's jurisdiction over cable will become less clear than it now is because the

analysis of the Court of Appeals directly contravenes the Court's holdings in *Southwestern Cable Co.* and *Midwest Video I*, *supra*.

Contradictory interpretations of *Southwestern Cable Co.* and *Midwest Video I*, *supra*, by two other Circuit Courts of Appeals indicate the potential for widely conflicting holdings among the Circuits, which also lessens the clarity and predictability of the law. For example, the Ninth Circuit Court of Appeals stated in *dicta* that the Commission may have the power to regulate cable under the common carrier provisions of Title II of the Communications Act of 1934, as amended, and may choose to exercise such power in the future. *American Civil Liberties Union v. Federal Communications Commission*, 523 F.2d 1344 (9th Cir., 1975). Conversely, in *National Association of Regulatory Utility Commissioners v. Federal Communications Commission*, 533 F.2d 601 (D.C. Cir., 1976), the D.C. Circuit reasoned that the two-way capability of cable technology is a common carrier activity and hence not subject to Commission regulation, because such regulation would not meet the "reasonably ancillary to broadcasting" test as set forth in *Midwest Video I*.

Such conflicting interpretations stem in large part from the hybrid nature of cable technology. As noted by the Court in *Southwestern Cable Co.*, *supra*, cable television has "characteristics both of broadcasting and of common carriers, but with all of the characteristics of neither . . ." 392 U.S. 157, 172. Thus, the attempt to coerce certain aspects of cable technology or cable regulation into a pre-existing regulatory structure applicable either to broadcasting or to common carriers represents a wooden analysis of essentially flexible legal precedents already established by the Court.

In *Southwestern Cable Co.*, *supra*, the Court expressly reserved decision on the source and scope of the Commission's authority to regulate cable "under any other circumstances or for any other purposes." 392 U.S. 157, 178. Given the circumstances and purposes of the access rules at issue here, the facts of this case may present the Court the opportunity to clarify the Commission's jurisdiction over cable television. Since the facts in that case and in *Midwest Video I*, *supra*, concerned only the cable operators' function as retransmitters of broadcast television signals, the Court appropriately looked to the Commission's regulation of broadcasting in formulating the test for determining the scope of the Commission's regulatory power. However, as noted by both the Ninth Circuit and the District of Columbia Circuit, the access channels which would be required by the rules at issue in these cases appear to be the functional equivalents of common carrier channels of communication. Thus, the Ninth Circuit indicated that such functions could be regulated appropriately pursuant to the common carrier provisions of Title II of the Communications Act of 1934, as amended.

The Court's review of these cases would clarify many of the issues which have arisen since *Midwest Video I*, *supra*, and provide the Commission and the lower courts with guidance as to the Commission's jurisdiction over cable. The Court would have the opportunity to undertake a functional analysis of the relationship between the access rules here at issue and the common carrier analog suggested by the Ninth and District of Columbia Circuits. It would have an opportunity to determine whether the limitations upon exercise of the Commission's Section 2(a) power must be measured solely by the "ancillary to broadcasting" test enunciated in *Southwestern Cable Co.* and *Midwest Video I*, *supra*, or whether exercise of that jurisdiction, addi-

tionally or alternatively, may fall within and be governed by the common carrier provisions of Title II of the Act, as argued below by Petitioner American Civil Liberties Union. (See Petitioner American Civil Liberties Union Petition for Writ of Certiorari, 11, n.9). The Court, by continuing the analysis begun in *Southwestern Cable Co.* and by examining the interstices of the entire Communications Act of 1934, could re-evaluate the limitations on the Commission's authority over cable and provide the analytical guidance necessary to ensure even-handed and predictable regulation of cable television.

II.

THE IMPORTANCE OF THE CASE

Amicus recognizes that the exercise of the Commission's regulatory jurisdiction over cable television has been marked by Commission vacillation and self-reversal, with respect both to the question of its own jurisdiction and to its substantive rules. However, for the reasons articulated below, the Commission must be permitted to develop cable access policies which will further its long-established policy goals.

As the Court recognized in *Southwestern* and *Midwest Video I*, *supra*, the Commission's long-established goals of localism and fostering diversity in communications generally remain viable but still unrealized objectives. The possibility of cable television increasing the number of outlets for community self-expression and for augmenting the public's choice of programs and other communications services remains an objective of critical public importance which should not be forsaken. The Commission should not be ordered to withdraw from the field at this juncture, but should be provided the judicial guidance neces-

sary for it to fulfill its mandate to ensure that the public interest is served by all of the electronic media.

Equally important, many of the Commission's goals with respect to common carrier regulation also are applicable in the context of the cable television industry. These include the provision of communications services of the best quality for the least possible cost, prevention of concentration of power and centralized control of the communications media, prohibition of anti-competitive practices, and equalization of competitive opportunities between various communications entities.¹

As in the rest of the economy, control of the various electronic media tends toward increasing concentration. Such control over information sources has significant implications for consumer choice, as well as for our form of government, if not counter-balanced by a right of ordinary citizens to access to those information sources.² The rules at issue in these cases, as well as the prospective rules which the Commission might determine to promulgate after investigation and rulemaking if not precluded by the decision below, are directly related to such access and, therefore, to the very significant issues of consumer choice and our system of government.

CONCLUSION

The Court should grant the Petitions for Writ of Certiorari because of the erroneous interpretation of existing law by the Eighth Circuit and because of the importance of upholding the Federal Communications Commission's regulatory jurisdiction over the public service obligations of the cable television industry.

Respectfully submitted,

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¹ See Berman, *CATV Leased Access Channels and the FCC: The Intractable Jurisdiction Question*, 51 Notre Dame Lawyer 145 (1975).

² See Barrow, *The New CATV Rules: Proceed on Delayed Yellow*, 25 Vanderbilt L.R. 681 (1972); see also *National Association of Regulatory Utility Commissioners v. Federal Communications Commission*, *supra*, 533 F.2d 601, 632-633 (Wright, J., dissenting).